have given the investigating officers a reasonable suspicion of illegal conduct prior to initiating the search for weapons (R-151-152)

11. The City of Mobile failed to prove that the Petitioner was ever informed that he was under "arrest." (R-157)

12. The first witness to testify was Sgt. Scott Davis, arresting officer, who was the supervising officer on the scene that initiated the physical contact with the Petitioner (3-08-04 – R-22-28)

13. Arresting officer could see the Petitioner's hands, and according to arresting officer, he did not ask the Petitioner to stand to be "checked," until after three (3) to five (5) minutes of belligerent cursing. (3-08-04 – R-23, 25-26) He then alleges he allowed the Petitioner to continue cursing for several more minutes before deciding to grab the Petitioner with a total of six to seven minutes of tirade occurring before physically engaging the Petitioner. (3-08-04 – R-56, 71) Arresting officer had previously admitted that he had no right to put his hands on the Petitioner until the Petitioner made the alleged sudden move to his waist. (R-76)

14. According to arresting officer, Officers Tolbert, Arnett, Schumock, Warren and himself arrived at approximately the same time with arresting officer in the lead and the others not far behind, with Tolbert and Arnett arriving at the scene as arresting officer and Schumock and Warren were exiting their vehicles. (3-08-04 – R-21-22, 32, 33, 81)

15. Arresting officer recognized Petitioner as a police officer. (3-08-04 – R-27)

16. Arresting officer claims the Petitioner's irrational behavior made him feel unsafe. (3-08-04 – R-27) The Petitioner claims he only asked why he was supposed to get up. (R-257-258)

17. Arresting officer is the only officer that alleges Petitioner made a sudden move **before** arresting officer engaged physical contact; all the other officers explained that arresting officer grabbed Petitioner and then Petitioner snatched his arm away from arresting officer. (3-08-04 – R-28, 84, 95, 123, 125, 148, 273)

18. Arresting officer grabbed Petitioner by the arm and snatched him up. (3-08-04 – R-28, 258)

19. Petitioner was tackled by arresting officer and the other officers following arresting officer's engaging physical contact. (3-08-04 – R-28-29)

20. After wrestling the cuffs onto Petitioner, Petitioner was taken to the ground a second time at which point the police radioed for shackles. (3-08-04 – R-29-30)

21. It is undisputed that the total time between the arrival of the officers to the scene and the radio call for shackles was four minutes, twenty one seconds, as established by the event chronology, Petitioner's exhibit 11 (R-73-74, R-121-122)

22. Arresting officer is approximately six foot, four inches tall and weighs approximately three hundred pounds, and he sat on the handcuffed Petitioner in the Petitioner's front yard until shackles arrived. (3-08-04 – R-30, 51)

23. Arresting officer was approximately three to four feet from Petitioner when he first spoke to him. (3-08-04 – R-36, 94) Petitioner never moved his hands during his

alleged belligerent outburst, and never put his hands on the officers in any way. (3-08-04 – R-37-38) During the alleged questioning and belligerent responses, all the officers were within three to five feet of Petitioner. (3-08-04 – R-38-40) Arresting officer could not articulate any facts that indicated illegal conduct on the part of the Petitioner prior to the failure to obey the order allegedly to be checked for weapons. (3-08-04 – R-40-43, 45)

24. Arresting officer claims the point in time when he had to physically engage the Petitioner was not until the Petitioner made the alleged sudden movement to his waist. (3-08-04 – R-50) Arresting officer testified that the Petitioner was belligerent and resisting arrest and that it was approximately twelve minutes or more prior to the second time Petitioner was taken to the ground. (3-08-04 – R-53-57, 69-72)

25. Arresting officer testified under oath that prior to Petitioner making the alleged movement with his left hand that he did not have a right to put his hands on the Petitioner. (R-76)

26. The next witness called by the City of Mobile was Officer Schumock, who testified that Tolbert and Arnett arrived just as she and her rookie were getting out of their car. (R-81) Officer Schumock testified that arresting officer moved to grab Petitioner's arm, at which point Petitioner snatched away. (R-84, 95) It was Officer Schumock that radioed for shackles that was during the second take down of Byron Petitioner (R-86) Schumock testified that it was probably fifteen minutes between her arrival and the radio call for shackles. (R-86) She testified that Petitioner possessed no weapon and had not struck his wife and the radio call out in this case came out as a thirty-nine, which

is a domestic disturbance without violence as opposed to a thirty-nine (B), which would be domestic violence. (R-89-90)

27. Officer Tolbert testified that the first words out of arresting officer's mouth were to ask the Petitioner to stand up. This was consistent with what the Petitioner states. (R-107, 124, 257-258, 111)

28. Officer Tolbert explained that arresting officer was standing within a foot of Petitioner during the questioning. (R-122)

29. Officer Tolbert also explained that Petitioner moved after arresting officer reached for him, contrary to arresting officer's testimony and consistent with the remaining officers as well as Petitioner's testimony. (R-123, 125)

30. Officer Warren testified that all the officers approached the house at the same time. (R-142-143)

31. Officer Warren testified that Petitioner was responding in a moderate to high level, loud enough for the neighbors to possibly hear (R-146) Prior to Petitioner being physically engaged, he made no threats (R-147) Warren explains that arresting officer grabbed Petitioner before Petitioner snatched his arm away. (R-148) Officer Warren explained that the Petitioner had told the officers his shoulder was hurting, and that when Petitioner was removed from his police car following the second take down, he was placed in the street and hogtied with the shackles and cuffs being connected by another pair of cuffs behind his back. (R-150)

32. Officer Warren testified that there was ten to fifteen minutes between the arrival and the second takedown of the Petitioner. (R-153)

33. The Petitioner was not told that he was under arrest. (R-157)

34. Contrary to the complaint in this action, the Petitioner had made no threats prior to being taken into custody. (R-158)

35. The radio operator, Feltz, testified that he radio advised this was a domestic trouble, signal thirty-nine, and that is what he would have told arresting officer. (R-161)

36. Feltz testified that the signal thirty-nine was never changed to a thirty-nine (B), which indicate no domestic violence. (R-169-170)

37. The Petitioner's neighbor, Robert Williams, Jr., testified that he was in his house, approximately twenty four feet from the Petitioner's house and that he was awakened by Byron Petitioner's yelling who was out by his mailbox when he first heard him, and that he didn't hear any loud disturbances up close to the Petitioner's house. (R-196-197, 202)

38. Robert Williams' wife, Ollie Mae Williams, testified that when she first heard a disturbance by Petitioner, he was shackled and handcuffed and hogtied on the corner of his yard or in the street. (R-203-204)

39. The next witness to testify was US Marshall, Robert Brown, a friend of the Petitioner, Byron Petitioner, who testified that he had been with Byron at a bachelor party that he had some responsibility for because his association was in charge of the building. He states they were there from 9:00 PM to 3:00 AM, that he had an opportunity to observe Byron Petitioner, and that Byron Petitioner did not appear to be intoxicated. (R-208-211). Marshall Brown

testified that a reactionary gap is the distance between you and the opposing subject which is approximately six feet to give you reaction time. (R-211-212)

40. Although arresting officer alleged Petitioner was behaving irrationally due to alcohol, the booking officer at Mobile Metro Jail, who has the duty of handling intoxicated prisoners differently from sober prisoners, stated the Petitioner was not intoxicated. (R-24-25, 228-229)

41. The Petitioner's wife, Rhondalyn Petitioner, testified that she had her front door open with the glass storm door closed and could see the officers walk up to the Petitioner telling him to stand up. (R-242-244).

42. Mrs. Petitioner attempted to step outside, but was instructed to go back inside the house. (R-244)

43. Mrs. Petitioner did observe the Petitioner hogtied and handcuffed in the street. (R-245)

44. Byron Petitioner testified he had been with the Mobile Police Department fourteen years and together with Mrs. Petitioner for twelve years. (R-251-252)

45. Since these charges, the Petitioner is no longer employed with the Mobile Police Department. (R-252)

46. The Petitioner's wife, ignored the Petitioner, and the Petitioner having accidentally broken one window, while tapping on it, went around to the other side of the house to attempt to intentionally break another window to gain entrance to his own home. (R-237, 253-255)

47. The Petitioner, a fourteen-year police veteran, was seated with his hands in plain view waiting on the officers to come let him in his house, simply asked why he was

being instructed to stand up instead of actually refusing any order. (R-257-258)

48. Officer Tolbert stated the only thing arresting officer did was walk up to the Petitioner and say, "Get up." (R-257)

49. After the Petitioner asked why he was being asked to "get up," arresting officer repeated again, "Get up." The Petitioner again asked the same question, and it was at that point that arresting officer grabbed Byron Petitioner by the arm. (R-257-258, 263, 264)

50. Following arresting officer snatching Petitioner up by his arm, he was jumped on by a bunch of officers. (R-258)

51. Petitioner explains that he did not kick arresting officer, but rather planted his foot when he was being forced to the car, and at that time he was taken down to the ground the second time. (R-258)

52. The Petitioner testified he was not angry at the officers until he was taken down on the ground the second time and arresting officer bent his arm back with the cuffs on and had the Petitioner screaming in pain. (R-265)

53. The next officer who testified was Ted Arnette, who explained Officer Tolbert was a couple of steps ahead of him upon arrival. (R-267)

54. Officer Arnette testified that himself and Officer Tolbert were in a forty position talking when the call first came out. (R-268)

55. Officer Arnette testified the first thing arresting officer said to Petitioner was either stand up or get up. He

did not recall arresting officer making any statement to the effect of, "what is going on?" (R-269-270, 282)

56. Petitioner did not threaten anyone prior to arresting officer putting hands on him. (R-272)

57. Officer Arnette testified that arresting officer reached for Petitioner after repeating two or three times to get up. (R-273)

58. Officer Arnette is consistent with Petitioner in that he did not hear arresting officer say the words, "I need to check you for weapons." (R-273-274)

59. According to the event chronology radio log, there was seven seconds between arresting officer's arrival and Officer Arnette's arrival. (R-276-277)

60. Officer Arnette did not hear arresting officer say, "for weapons," rather just, "Get up," consistent with the Petitioner's version of events. (R-279)

REASONS FOR GRANTING THE WRIT

I. THE CITY ORDINANCE IN QUESTION IS UNCONSTITUTIONAL ON ITS FACE AND AS APPLIED AND IN DIRECT CONFLICT WITH *SHUTTLESWORTH V. CITY OF BIRMINGHAM.*

This Honorable Court should review this case because the state appeals courts refuse to follow the law provided in *Shuttlesworth v. City of Birmingham*, 382 U.S. 87 (1965). In this case, the jury could not convict the Petitioner of Failure to Obey, but was not told he had the right to resist illegal arrests, and convicted him of resisting arrest without reaching a conclusion on the underlying charge. Regarding the underlying charging ordinance, City

Code Sec. 39-54, the Alabama Supreme Court without reference to a single case, and ignoring the admonition of the U.S. Supreme Court in *Shuttlesworth v. City of Birmingham*, 382 U.S. 87 (1965) provided illegal, circular reasoning to assert the dangerous proposition that, "An officer can only give lawful orders if he is acting in his official capacity." *Ex Parte Battles, Jr.*, 771 So.2d 503 (Ala. 2000). How are citizens to know when an officer is in his "official capacity?"

The void for vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness so that ordinary people can understand what conduct is prohibited . . . and does not encourage arbitrary and discriminatory enforcement. *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). This is especially true where the statute threatens to offend constitutionally protected rights. *Colautti v. Franklin*, 439 U.S. 379, 391 (1979). "No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids." *Champlin Rfg. Co. v. Commission*, 274 U.S. 445, 458.

A person of ordinary intelligence cannot discern what constitutes innocent and criminal conduct under Section 39-54 because lawful conduct can be criminalized under the police officer's discretion. Here, under Section 39-54, the arresting officer had unchecked discretion to arrest Petitioner for failure to obey. The Petitioner had broken no law before being asked to stand up by the arresting officer. The language of Section 39-54 states that an officer can arrest a person for failure to obey so long as the officer is within his official capacity. A person of ordinary intelligence can not possibly know what "official capacity"

means. The Petitioner did not know that he could be arrested for failure to obey after the arresting officer simply told him to stand up. This does not put a person with ordinary intelligence on notice that their conduct may be illegal. Therefore, the ordinance is unconstitutionally broad.

Betty Coughlin v. State, 320 So.2d 739 (Ala. Crim. App. 1975), addresses the state statute for Failure to Obey. In *Coughlin*, the Alabama Criminal Court of Appeals discussed the fact that the state statute " . . . was enacted as a traffic control measure and as a comprehensive amendment to that body of law commonly known as 'Rules of the Road.' Section 47 was not intended to, does not, and cannot give police officers unbridled power to arrest for refusal to obey any order they may choose to direct at a citizen." *Id.* at 742.

Coughlin, goes on to say, "Thus we must attempt to give Section 47 a field of operation in relation to the purpose and intent of Act No. 516, **or else it is constitutionally obnoxious**." For the order to be "lawful" the order must be **directly related to traffic control.** *Id.* at 742. (Emphasis added)

The city ordinance under which the Petitioner was allegedly resisting arrest, reads as follows:

> **Sec. 39-54. Failing to obey direction of order of police officer.**
>
> (a) It shall be unlawful and an offense against the city for any person to fail to obey the direction or order of a member of the police department of the city while such member is acting in an official capacity in carrying out his duties.

(b) Any person found guilty of violating the provisions of this section shall be punished as provided in chapter 1, article II, City Code (1991). (Code 1965, Sec. 47-6.1)

The State statute reads:

32-5A-4. Compliance with lawful orders

No person shall willfully fail or refuse to comply with any lawful order or direction of any police officer or fireman invested by law with authority to direct, control or regulate traffic. Acts 1980s, No. 80-434.

"If on its face the challenged provision is repugnant to the due process clause, specification of details of the offense intended to be charged would not serve to validate it. Cf. *United States v. Reese*, 92 U.S. 214, 221 (1875); *Czarra v. Board of Medical Supervisors*, 25 App. D.C. 443, 453 (1905). It is the statute, not the accusation under it, that prescribes the rule to govern conduct and warns against transgression. See *Stromberg v. California*, 283 U.S. 359, 368 (1931); *Lovell v. Griffin*, 303 U.S. 444 (1938). No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids. *Champlin Rfg. Co. v. Commission*, 274 U.S. 445, 458 . *Connally v. General Construction Co.*, 269 U.S. 385, 391-393 (1926). *Small Co. v. American Sugar Rfg. Co.*, 267 U.S. 233, 239 (1925). *United States v. Cohen Grocery Co.*, 255 U.S. 81, 89-92 (1921). *Collins v. Kentucky*, 234 U.S. 634, 638 (1914). *International Harvester Co. v. Kentucky*, 234 U.S. 216, 221-223 (1914). Cf. *People v. Belcastro*, 356 Ill. 144; 190 N.E. 301 (1934). *People v. Licavoli*, 264 Mich. 643; 250 N.W. 520 (1933). The applicable rule is stated in *Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926): 'That the terms of a penal statute creating a new

offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law. And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.'" *Lanzetta, et al. v. New Jersey*, 306 U.S. 451 (1939). *Lanzetta* dealt with an unrelated statute regarding classification of individuals as gangsters, but the principles of law regarding vague statutes apply equally well to this city ordinance for Failure to Obey.

Shuttlesworth v. City of Birmingham, 382 U.S. 87 (1965) discusses Section 1231 of the General City Code of Birmingham that contains the language used in the State statute. " . . . the literal terms of this ordinance are so broad as to evoke constitutional doubts of the utmost gravity. But the Alabama Court of Appeals has confined this ordinance to a relatively narrow scope." *Id.* at 93.

The city ordinance is not expressly limited to traffic control, nor was it passed in a traffic package of law; how can the state court suggest that the statute in question is not constitutionally repugnant without the presence of the required limitations?

The differences, between the state statute that has been declared constitutional and the city ordinance in question, are material differences that illustrate just how unconstitutional the city ordinance is. This Honorable Court has referred to the language of our state statute as so broad as to evoke constitutional doubts of the utmost gravity but for the narrow interpretation it has received.

The narrow interpretation is tied to the state statute's express traffic control policy and the express requirement that the officer's order be lawful; neither is present in this case. The Petitioner was seated on his own front porch. The Alabama Supreme Court has not given any narrow interpretation to the limitless realm of commands that may be issued by Mobile Police Officers purporting to be acting within their "official capacity."

This city statute gives notice to no one, not citizens, nor jurors, nor police officers and is violative on its face of the due process requirements constitutionally mandated. Claiming that any order given while acting in "official capacity" is a narrow interpretation is simply a breach of the oath to uphold the constitutions.

The statute at bar is contrary to an executive branch of limited powers, and flies in the face of giving due process notice to citizens of what conduct is prohibited, and is a violent attack on freedom.

The testimony at trial was that before the order to get up was issued, the arresting officer could point to no facts of illegal conduct on the part of the Petitioner. (R-43) The arresting officer admitted that he recognized the Petitioner was a police officer at his home. (R-43) The City failed to establish that the Petitioner was ever informed he was under arrest, nor why he'd been arrested.

Alabama law is clear that, to a limited degree, a party is justified in attempting to resist an unlawful arrest. *Ex Parte Edwards*, 452 So.2d 503 (Ala. 1983). Whether this state right encompasses the right to resist an unlawful search and whether the amount of resistance here was reasonable are questions of state law. *Wainright v. City of*

New Orleans, 392 U.S. 598, 609, 88 S.Ct. 2243, 2252 (1968).

Petitioner was allowed to lawfully resist arrest because Petitioner was never told he was under arrest prior to the alleged unlawful resistance and the arresting officer testified that he had not engaged in any illegal conduct before he asked Petitioner to "get up." Petitioner did not know why he was being asked to stand up. Petitioner's conduct after the arresting officer physically restrained him was justified because he was trying to prevent an unlawful arrest. Because the Petitioner was subjected to an unlawful arrest and Alabama allows Petitioner to resist such an arrest, this Court must reverse and vacate Petitioner's guilty conviction for resisting arrest.

However, for purposes of argument, accepting the arresting officer's version that he instructed Petitioner to stand so that he could be checked for weapons, arresting officer still had to comply with the Fourth Amendment.

What does the Fourth Amendment require? "Reasonable suspension is a less demanding standard than probable cause," *Alabama v. White* 496 U.S. 325, 330, 110 S. Ct. 2412, 2416, 110 L. Ed. 2d 301 (1990) requiring only that the detaining officer have "a particularized and objective basis for suspecting the person detained for criminal activity," *Webb v. State*, 500 So.2d 1280, 1281 (Ala. Crim. App.), *cert. denied*, 500 So.2d 1282 (Ala. 1986). *Riddles Sprigger v. State*, 803 So.2d 579, 581 (Ala. Crim. App. 2001). What reasonably articulable facts did the officers have in this case:

> "And in this case, what facts did you have before you that indicated to you that any crime had occurred, Officer?"

"We were there to investigate a domestic situation."

"Tell me, Officer, what facts you observed?"

"As far as a domestic incident?"

"Just what facts of any illegal conduct did you observe."

"There were none at that time."

The Fourth Amendment protects an individual from unreasonable searches, and *Terry* requires the arresting officer be able to articulate facts indicating criminal activity. Petitioner's due process safeguards were violated because he was subjected to a search without "reasonable suspicion." "To justify governmental intrusion on the Fourth Amendment rights of a private citizen, specific and articulable facts must be present which, when taken together with rational inferences from those facts, would reasonably warrant such intrusion." *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968). In *United States v. Post*, 607 F.2d 847 (9th Cir. 1979), the Court discussed the "reasonable suspicion" prong of *Terry*, holding, "the quantum of cause necessary to justify an investigatory stop is a 'reasonable' or 'founded' suspicion that the person has committed or is about to commit a criminal act . . . " (Emphasis added). Here there were broken windows in the defendant's own home, not illegal. There was nothing illegal about breaking a window to enter his own house. If the defendant was belligerent as claimed by the officers, there would arguably exist disturbing the peace or harassment evidence, but that requires a finding of fact contrary to the defendant's version of the disputed facts. Prior to the order to stand, there was no evidence of illegal conduct to allow the defendant to be

frisked under *Terry v. Ohio*, 392 U.S. 1 (1968) and *State v. Bodereck*, 549 So.2d 542 (Ala. Crim. App. 1989). What facts indicated any illegality? Until the illegal order to stand was given, it is undisputed the Petitioner had broken no law, and the record is absent of any facts indicating otherwise. The arresting officer hangs his hat on the failure to obey. This arresting officer's version is impossible based on the event chronology establishing the actual times, and he should not be believed. *Ford v. State*, 680 So.2d 948 (Ala. Crim. App. 1995) It is simply not possible for twelve minutes of belligerence and two takedowns to have occurred within the four minutes, twenty seconds established by the Mobile Police's event chronology.

II. PETITIONER WAS DENIED HIS TRIAL BY JURY WHEN THE TRIAL COURT MADE FINDINGS OF DISPUTED FACT WITHOUT ALLOWING THE JURY TO MAKE THE FINDINGS.

An issue of fact existed as to the actual order in this case as well as the demeanor of the Petitioner. The Petitioner claimed that arresting officer said, "Get up!" The Petitioner claims that he said nothing more than, "For what?" For the trial court to find otherwise, was an illegal usurpation of the jury's right to resolve an issue of fact. Additionally, contrary to the trial court's claim, "I'm not making a factual finding of truthfulness . . . ," he did rule on the Petitioner's demeanor in favor of the city and to the Petitioner's detriment. (296) The trial court ruled that the Petitioner's demeanor was part of the justification for the search. (296) The trial court also found that the order given included an explanation that the Petitioner was "to be checked for weapons," even though the Petitioner disputed that fact. (152) If in fact the officers on the scene

lied about the demeanor of the Petitioner and he was not belligerent nor threatening there is no reasonable basis to search him. Even if all off duty officers are subject to being frisked because they may be armed, presumably even they to are protected by the Fourth Amendment's requirement that the investigating officer be able to articulate some facts indicating illegal conduct.

Additionally, the officers indicated that the questioning and Petitioner's verbally offensive responses went on for some 5-10 minutes, with 12 minutes alleged to have elapsed by the second time Petitioner was taken to the ground. The Petitioner explains none of the alleged belligerence happened. The Petitioner claims that he was illegally ordered to stand and taken to the ground immediately after he asked why. The Petitioner's version is supported by the event chronology that illustrates that by the time he had been taken down two times and shackles were radio requested, only four minutes, twenty seconds had gone by. The four minutes included the arrival of the officers, their approach, the instruction to get up, the wrestling with the Petitioner to cuff him and taking the Petitioner to the ground a second time. There simply was not time for the events to have occurred as the city alleged. It was impossible according to the only objective evidence, the City's event chronology, for the arresting officers' allegations of some ten to twelve minutes of belligerence to have occurred before the shackles were ordered.

At the time the arresting officers claim Petitioner was being belligerent on his front porch, the event chronology reveals he was already on the ground for the second time under arresting officer's 300 pounds and awaiting shackles. The jury should have been allowed to decide the disputed facts. U.S. Const. amend. VI.

III. THE CITY ORDINANCE IN QUESTION PROMOTES VIOLATION OF EQUAL PROTECTION RIGHTS OF THE APPELLANT AND ALL BLACK CITIZENS IN MOBILE, ALABAMA.

The Petitioner is a black male, the arresting officers, white. The statute at issue is applied over three to one, black to white. (R-418-420) This violates the equal protection guaranteed by the Fourteenth Amendment to the U.S. Constitution.

No one reading this brief should believe that the officer, who stood over the appellant on his own front porch, took him to the ground twice, cuffed, shackled, and left him in the street hogtied would have acted the same if the Petitioner was white.

Why else was the only black officer whom the City claims was present not be able to produce the vehicle satellite tracking data to support the contention that he was present? All the white officers data was provided. Just as the Petitioner claims, the City's "token black cop" was not there when they claim.

CONCLUSION

The municipal ordinance in question is constitutionally repugnant on its face. The Alabama Supreme Court is refusing to comply with *Shuttlesworth v. City of Birmingham*. Petitioner, had broken no laws and gave no justification to search him. What was done to Petitioner was wrong. Ultimately, this should have been an administrative proceeding for Petitioner's alleged failure to obey his superior's order to get up. Because he was shackled and hogtied in the street where the public could see, the

officers had to justify their actions with arrest. It's like re-attaching an arm to a body, but starting at the hand. By the time you get back to the shoulder, the arm won't quite fit. Just as in this case there was no initial breach of any law, but rather officers working backwards through time to justify their illegal conduct. The event chronology, the actual time, and their own stories show that their case just doesn't fit. Arresting officer standing over Petitioner bullied the man without legal justification and later tried to justify it. His conviction is due to be reversed, and the "Uh, oh!" statute (as it has come to be known among the Mobile police) is due to be struck.

This case is a perfect example of why this statute should not exist. The jury could not convict this Petitioner on an underlying charge even though the court had instructed them that the arrest was legal and even though the arrest was based solely on an unconscionable statute.

Respectfully submitted,

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APPENDIX A

Notice: This unpublished memorandum should not be cited as precedent. See Rule 54, Ala.R.App.P. Rule 54(d), states, in part, that this memorandum "shall have no precedential value and shall not be cited in arguments or briefs and shall not be used by any court within this state, except for the purpose of establishing the application of the doctrine of law of the case, res judicata, collateral estoppel, double jeopardy, or procedural bar."

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MEMORANDUM

CR-03-1159 Mobile Circuit Court CC-03-3230

Byron C. McCoy v. City of Mobile

WISE, Judge.

The appellant, Byron C. McCoy, was convicted in Mobile Municipal Court of one count of resisting arrest, a

violation of § 13A-10-41, Ala. Code 1975.[1] McCoy appealed to the circuit court for a trial de novo, pursuant to Rule 30.1, Ala.R.Crim.P., where the jury returned a guilty verdict as to the count of resisting arrest. He was sentenced to 180 days' incarceration in the Mobile County Metro Jail, which was suspended for 12 months. This appeal followed.

The evidence established that during the pre-dawn hours of March 22, 2003, Sergeant Scott Davis of the Mobile Police Department responded to a domestic violence call at 6817 Greenway Drive South. Davis was informed by the dispatcher that a law enforcement officer was involved.[2] Because Sergeant Davis was aware that domestic violence disturbances often resulted in danger to the persons involved – including law enforcement officers responding to the call – he waited for backup officers Carla Shummock and Jason Warren to arrive before he approached the residence.

As Officers Davis, Shummock, and Warren approached the house, Officers Ted Arnette and George Tolbert arrived on the scene and all five officers approached the house. The officers observed McCoy sitting on the porch of the residence in a very defensive posture; he appeared agitated, and he cursed at the officers as they approached. McCoy commented that he could "break the windows of his own house if he wanted to." Davis noted that one of the windows of the residence was broken and

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[1] We note that McCoy was also convicted of one count of failure to obey a police officer. However, the circuit court jury did not return a guilty verdict as to this violation.

[2] McCoy was previously employed by the Mobile Police Department as an officer. After the instant offense, his employment was terminated.

began questioning McCoy. Davis also noticed that McCoy smelled strongly of alcohol.

Sergeant Davis instructed McCoy to stand, so that he could check him for weapons. McCoy replied that he did not have to do anything and refused to cooperate. At least three separate attempts were made to obtain McCoy's cooperation. McCoy then made a sudden move, prompting Sergeant Davis to grab McCoy's hand as he jumped from the porch. A struggle ensued, which resulted in McCoy's arrest for failure to obey a police officer. During this time, McCoy continued his belligerent behavior, thrashing on the ground and threatening officers. Sergeant Davis eventually handcuffed McCoy and he and Officer Warren led McCoy to the patrol car. As McCoy was escorted to the patrol car, he kicked Sergeant Davis in the left leg, causing him to fall to the ground. Leg irons were brought by another officer and placed on McCoy, who was then placed in the rear of the patrol car. After being placed in the patrol car, McCoy attempted to kick out the vehicle's windows. McCoy was removed from the patrol car and further restrained. Based on his assault of Sergeant Davis after his arrest, McCoy was charged with resisting arrest and failure to obey a police officer based on his continued aberrant behavior when he was placed in the patrol car.

McCoy testified in his own defense. He stated that he had consumed a six-pack of beer on the evening in question. He admitted to breaking the window to his house. He further stated that he recognized Sergeant Davis as a police officer and that Sergeant Nance did ask him repeatedly to stand to be patted down for weapons but he did not comply.

McCoy alleges numerous errors on appeal. We will address each of his contentions on their merits.

I.

McCoy argues that the circuit court did not have jurisdiction to hear his case. Specifically, he contends: (1) that the complaint was not signed by the prosecuting attorney; (2) that the complaint was not supported by a proper affidavit; and (3) that the law enforcement field report filed with the complaint violated police procedures and did not support the complaint. On that basis, he claims that the complaint is voidable and he was improperly convicted.

Even if any of the above claims as to the validity of the complaint were meritorious, none of those defects involve the subject matter jurisdiction of the circuit court. The record contains a copy of the original complaint filed in the municipal court which was signed by both the complainant, Officer Davis, and a magistrate, and was witnessed. There is no requirement that another complaint be issued and signed prior to an appeal to the circuit court. Rule 30, Ala.R.Crim.P., governs appeals from a municipal court to a circuit court. It requires that an appeal from the municipal court for a trial de novo in circuit court be perfected by the timely filing of a written notice of appeal and the posting of a new bond in an amount fixed by the municipal court. Within 14 days of those procedural requirements, the clerk of the municipal court shall transmit to the Circuit Clerk all records of the municipal court proceeding, including the original charging instrument. Rule 30.4(a), Ala.R.Crim.P.

Even if the complaint was defective, it was not necessary that the prosecuting attorney file a new complaint. In *Ex parte Young*, 611 So.2d 414, 416 (Ala. 1992), the Alabama Supreme Court held the requirement in § 12-22-113, Ala.Code 1975, that a prosecuting attorney file an entirely new complaint was deemed unnecessary by the Legislature when it enacted § 12-14-70, Ala.Code 1975. We note that McCoy was fully informed of the charges against him by the complaint filed in Mobile Municipal Court, and that it fully apprised him of the nature and cause of the accusation. See *City of Foley v. Collier*, 586 So.2d 1011 (Ala.Crim.App. 1991). Therefore, since defective complaints do not involve the subject matter jurisdiction of the Circuit Court and McCoy was fully informed of the charges against him, no basis for reversal exists as to McCoy's claim.

II.

McCoy also argues that the magistrate in the instant case harbored personal bias against him. Thus, he says, the complaint against him was improperly issued. The record and Alabama case law do not support his contention.

"[I]n Alabama there is a presumption that a judge is qualified and unbiased and a person contending otherwise has the burden of proof to overcome the presumption." *Davis v. State*, 554 So.2d 1094, 1099 (Ala.Crim.App. 1984), aff'd, 554 So.2d 1111 (Ala. 1989). In similar situations, we have held that, as long as the magistrate was not otherwise involved in the investigation or prosecution of the particular case, he was not disqualified to act as a neutral and detached magistrate simply because of some alleged

bias based on his prior dealings with McCoy. The record reveals that the affidavit and complaint were based on the sworn testimony of a law enforcement officer who personally witnessed the commission of the offense. Probable cause existed to arrest McCoy based on the complaint and affidavit and we find no reversible error as to this claim.

III.

McCoy also claims that the trial court committed reversible error when it refused to allow defense counsel to read the complaint to the jury during closing arguments. Specifically, McCoy wanted to read the complaint to the jury to point out a fatal variance between the complaint and the evidence.

It is well established that, in closing arguments, counsel may not argue facts that are not reflected by the evidence. The test of a legitimate argument is that whatever is based on facts in evidence is within the scope of proper comment in argument to the jury. *Cross v. State*, 536 So.2d 155, 160 (Ala.Crim.App. 1988) (citing *Ward v. State*, 440 So.2d 1227, 1230 (Ala.Crim.App. 1983)).

Here, the complaint and Sergeant Davis's police report were never admitted into evidence. During cross-examination, McCoy never questioned Sergeant Davis about any alleged variances. Because the complaint was not admitted into evidence, the trial court did not abuse its broad discretion when it prohibited defense counsel from reading the complaint to the jury during closing argument.

IV.

Next, McCoy contends that he is entitled to a new trial based on the actions of the trial court, which, he claims, prejudiced his defense and denied him a fair trial. Specifically, he claims that during trial the trial judge (1) made certain facial expressions, gestures and audible signs that tended to indicate a doubt or disbelief in McCoy's position; (2) made comments requesting that defense counsel not speak so loudly and stating that the city and police officers were "not on trial"; and (3) allowed testimony from Officer Tolbert relating to McCoy's actions and speech at the time of the offense.

Regarding McCoy's first claim, to support his contention that the trial judge made inappropriate facial expressions, gestures, and related behaviors, McCoy submitted two affidavits executed by friends who were present at trial. At no time prior to the time the jury returned with a guilty verdict did McCoy ever mention the trial judge's behavior.

The trial court instructed the jury that it had no opinion regarding the facts in the case. The court further instructed the jury that it was to consider only the evidence in reaching a verdict. Furthermore, we note that the trial court instructed the jury that it was the trier of fact and that any ruling that the trial court made was not to be considered evidence. Jurors are presumed to follow the trial court's instructions. *Taylor v. State*, 666 So.2d 36, 70 (Ala.Crim.App. 1994), aff'd, 666 So.2d 73 (Ala. 1995); *Holland v. State*, 588 So.2d 543, 549 (Ala. Crim. App. 1991). Thus, the judge's instruction to the jury prevented any possible prejudice. Rule 45, Ala.R.App.P.

In *Maples v. State*, 758 So.2d 1 (Ala.Crim.App.), aff'd, 758 So.2d 81 (Ala. 1999), this Court held:

> "'"Each case of allegedly improper remarks by a trial judge must be judged on its own peculiar facts." *Dooley v. State*, 575 So.2d 1191, 1194 (Ala.Crim.App. 1990); *McNeely v. State*, 524 So. 2d 375 (Ala.Crim.App. 1986), (quoting *Oglen v. State*, 440 So. 2d 1172, 1175-76 (Ala.Crim.App.). "While a particular remark by the trial judge may be open to question, in order for it to amount to grossly improper error requiring reversal, it must have influenced the result of the case." *Thompson v. State*, 503 So. 2d 871, 879 (Ala. Crim. App. 1986).'"

758 So.2d at 45 (quoting *Slaton v. State*, 680 So.2d 879, 886 (Ala.Crim.App. 1995)).

Our examination of the record reveals that the comments of the trial judge concerning the city and police officers were made outside the jury's presence. The comments relating to trial counsel were self-explanatory. Neither of these comments would have influenced the result of the trial; thus, no basis for reversal exists as to these issues.

Likewise, McCoy's argument that the trial court's ruling on testimony given by Officer Tolbert which, he says, reflected bias and contained hearsay regarding McCoy's demeanor at the time of his arrest is without merit. Officer Tolbert testified as to his observations and communications with McCoy at the time of his restraint and arrest. The testimony in question was elicited by defense counsel, during his examination of the witness and was properly admissible under the hearsay exceptions found in Rule 801(c), 801(d)(2), or 803(2), Ala.R.Evid.

V.

McCoy contends that he was mistreated by Mobile Police officers. He asserts this mistreatment was the functional equivalent of punishment, and, as a result, he should not have been tried. Alternatively, he argues that the charges against him should have been dismissed based on the alleged mistreatment. The City of Mobile denied that it mistreated McCoy in any way.

The record established that McCoy was handcuffed, based on his hostile and belligerent behavior on the night of the offense. When McCoy used his feet to attack Sergeant Davis, his legs were placed in leg irons and he was placed in the rear of the patrol car. McCoy then attempted to kick out the rear windows of the patrol car. That conduct forced the officers to further restrain McCoy in a fashion that he refers to as being "hog tied."

Although McCoy attempts to raise this claim in an Eighth Amendment context, which typically governs terms of imprisonment and execution, it is actually an issue arising under the Fourth Amendment. "'Fourth Amendment jurisprudence has long recognized that the right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it.'" *Garrett v. Athens-Clarke County, Georgia*, 378 F.3d 1274, 1279 (11th Cir. 2004) (quoting *Graham v. Connor*, 490 U.S. 386, 109 S.Ct. 1865, 1871-72, 104 L.Ed.2d 443 (1989)). Given the circumstances of this case, as set out above, we conclude that "the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them." 378 F.3d at 1279 (quoting *Graham v. Connor*, 109 S.Ct. at 1872). See also *Walker v. City of Mobile*, 508 So.2d 1209, 1213

(Ala.Crim.App. 1987). Accordingly, no basis for reversal exists as to this claim.

VI.

McCoy next contends that the trial court erred when it refused to charge the jury with an instruction that a person may resist an unlawful arrest.

A trial court has broad discretion in formulating its jury instructions, providing those instructions accurately reflect the law and the facts of the case. *Harrington v. State*, 858 So.2d 278, 303 (Ala.Crim.App. 2002); *Davis v. State*, 804 So.2d 1153, 1162 (Ala.Crim.App. 2000); *Williams v. State*, 611 So.2d 1119, 1123 (Ala.Crim.App. 1992); *Raper v. State*, 584 So.2d 544, 545 (Ala.Crim.App. 1991). The trial court did not abuse its discretion when it refused to give the requested instruction.

The evidence in the record before us shows that Sergeant Davis responded to a domestic disturbance call involving a law enforcement officer. In his experience, he knew that most off-duty police officers carry weapons. He recognized McCoy as a Mobile City Police officer and noted that McCoy had been drinking and was acting in an irrational manner. In repeated attempts to search McCoy's person for weapons, McCoy was noncompliant. Thus, the trial court properly determined that as a matter of law, McCoy's arrest was lawful. Because the determination of whether the arrest was lawful was a question of law to be resolved by the trial court, – rather than a question of fact to be determined by the jury – the trial court properly refused to give the instruction. No basis for reversal exists as to this claim.

VII.

McCoy also contends that the city ordinance under which he was arrested, Mobile Municipal Ordinance No. 39-54, is facially unconstitutional. Alternatively, he argues that the ordinance is unconstitutional in its application to him in the instant case. We find his claim to be without merit.

This argument was rejected by the Alabama Supreme Court, in *Ex parte Battles*, 771 So.2d 503 (Ala. 2000). Although the court reversed Battles's conviction on the grounds that the evidence failed to establish that Battles violated the ordinance, it upheld the constitutionality of the ordinance – requiring that citizens obey an order of a police officer – was limited in scope and restricted itself to any lawful order made by a police officer while acting in an official capacity and carrying out his duties. Thus, McCoy's argument is without merit.

VIII.

McCoy also argues that the application of the city ordinance in question to him violated his rights under the Equal Protection Clause of the United States Constitution. Because McCoy has presented no evidence to support this claim, he has failed to persuade this Court that such a violation occurred.

The City of Mobile cites *Williams v. State*, 393 So.2d 492 (Ala.Crim.App. 1981), in support of its argument that selective prosecution alone is not unconstitutionally impermissible. In that case – as in the instant case – nothing in the record indicates selective enforcement of the Act. Moreover, the mere showing of selective enforcement of a statute, without more, is not constitutionally

impermissible. In *Oyler v. Boles*, 368 U.S. 448, 456 (1962), the United States Supreme Court observed:

> "[T]he conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation. Even though the statistics in this case might imply a policy of selective enforcement, it was not stated that the selection was deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification."

See also *Hunt v. State*, 642 So.2d 999, 1003-04 (Ala.Crim.App. 1993), aff'd, 642 So.2d 1060 (Ala. 1994).

For all of the foregoing reasons, McCoy is due no releif on appeal and the judgment of the trial court is due to be affirmed.

AFFIRMED.

McMillan, P.J., and Cobb, Baschab, and Shaw, JJ., concur.

APPENDIX B

THE STATE OF ALABAMA – JUDICIAL DEPARTMENT
THE ALABAMA COURT OF CRIMINAL APPEALS

CR-03-1159

Byron C. McCoy v. City of Mobile (Appeal from Mobile Circuit Court: CC03-3230)

CERTIFICATE OF JUDGMENT

WHEREAS, the appeal in the above referenced cause has been duly submitted and considered by the Court of Criminal Appeals; and

WHEREAS, the judgment indicated below was entered in this cause on January 7th 2005:

Affirmed by Memorandum.

NOW, THEREFORE, pursuant to Rule 41 of the Alabama Rules of Appellate Procedure, it is hereby certified that the aforesaid judgment is final.

Witness. Lane W. Mann,
Clerk
Court of Criminal Appeals, on this the 8th day of April, 2005.

/s/ Lane W. Mann
Clerk
Court of Criminal Appeals
State of Alabama

cc: Hon. Roderick P. Stout, Circuit Judge
Hon. Susan F. Wilson, Circuit Clerk
Michael Anthony Wing, Attorney
K. Paul Carbo, Jr., Attorney
Office of Attorney General

APPENDIX C

Date	Page No. 4	ACTIONS (Continued)	Case Number

CITY OF MOBILE vs. McCOY, Byron C. __ CC 2003 3230 rps
ID YR NUMBER

03/08/2004 Jury of 14 members were selected, sworn and charged for trial of case 12:00 p.m.

Jury recessed and instructed to return 03/09/2004 at 9:15.

IN COURT: City of Mobile Attorney, Paul Carbo
Defendants Attorney; Michael Wing

/s/ R. Stout

03/09/2004 Testimony taken

Jury recessed and instructed to return 03/10/2004 at 9:00 a.m.

IN COURT: City of Mobile Attorney, Paul Carbo
Defendants Attorney, Michael Wing

/s/ R. Stout

03/10/2004 Jury and verdict of guilty of **RESISTING ARREST**. It is further ordered that the defendant be and is hereby adjudged guilty of **RESISTING ARREST**.

Pre-Sentence Investigation ordered made on the defendant by Deloris Bagsby at Alternative Sentencing.

Defendant instructed to report to Alternative Sentencing.

RESET CASE FOR SENTENCING 4-12-2004 AT 8:30 A.M.

CASE ORDERED TRANSFERRED TO JUDGE STOUT'S DOCKET.

IN COURT: City of Mobile Attorney, Paul Carbo
Defendants Attorney, Michael Wing

/s/ R. Stout

4/12/04

MOTION FOR ACQUITTAL OR ALTERNATIVELY FOR A NEW TRIAL, FILED BY THE DEFENDANTS ATTORNEY MIKE WING ON APRIL 8, 2004

[Illegible] 4/12/04

APPENDIX D

CASE ACTION SUMMARY

==========

203030387701 **Case Number MC-20-03001850**

Defendant (Name)
BYRON MCCOY
6817 S GREENWAY DR
MOBILE, AL
251-380-9205

Employer:
MOBILE POLICE DEPT

Complainant:
JOHN S DAVIS JR - 2613

Witnesses
TED H ARNETTE

Mr. Carbo for City

BENCH NOTES:
10/29/3 [Illegible]

Sex Race --- DOB --- Trial Date
M B 07241961 ~~03232003~~

SSN: 419-04-1251

Charge:
FAIL TO OBEY OFFICER

Arrest Date -- Arresting Officer
03/22/2003 JOHN S. DAVIS JR - 2613

Date Committed - Date Released
3/23/03

Bond Amt -- Atty For Defendant
~~$1000~~ $500 M. Wing

Sureties
Docket Room

On 9/16/3 (date) the defendant appears in open court in person and pleads Not guilty. After hearing the evidence it is the judgement of the court that defendant is yes guilty and is fined _____ together with 156 costs, and sentenced to 90 days in city jail.

Additional orders suspended 12 mon. for usual Protection

/s/ Judge Lackey
Judge – Municipal Court

FEE SHEET

SUMMARY	TIME SERVED
Fine $	___ days at $ ___ per day
Costs	
Fair Trial Tax	APPEAL RECORD
Peace Officer's Annuity Fund	Circuit Court Number
Other	Date of Appeal 9/16/3
Bond Forfeiture	Amount of Bond $1,000
Total $	[Illegible]
	Bondsmen
CASH PAYMENT	Orders of the Circuit Court

Date Receipt Number Amount

CASE ACTION SUMMARY

==========

203030387701 **Case Number MC-20-03001851**

Defendant (Name)
BYRON MCCOY
6817 S GREENWAY DR
MOBILE, AL
251-380-9205

Employer:
MOBILE POLICE DEPT

Complainant:
JOHN S DAVIS JR - 2613

Witnesses
TED H ARNETTE

Mr. Carbo for City

Sex Race --- DOB --- Trial Date
M B 07241961 03232003

SSN: 419-04-1251

Charge:
RESISTING ARREST

Arrest Date -- Arresting Officer
03/22/2003 JOHN S. DAVIS JR - 2613

Date Committed - Date Released
3/23/03

Bond Amt -- Atty For Defendant
~~$1000~~ $500 M. Wing

BENCH NOTES: Sureties
10/29/3 [Illegible] Docket Room

On 9/16/3 (date) the defendant appears in open court in person and pleads Not guilty. After hearing the evidence it is the judgement of the court that defendant is yes guilty and is fined 300 together with 156 costs, and sentenced to 180 days in city jail.

Additional orders split 90 days c/s balance [illegible] probation 12 mo .

/s/ Judge Lackey
Judge – Municipal Court

FEE SHEET

SUMMARY

Fine $
Costs
Fair Trial Tax
Peace Officer's Annuity Fund
Other

Bond Forfeiture
Total $

CASH PAYMENT

Date Receipt Number Amount

TIME SERVED

___ days at $ ___ per day

APPEAL RECORD

Circuit Court Number
Date of Appeal 9/16/3
Amount of Bond $1,000
[Illegible]
Bondsmen
Orders of the Circuit Court

ALABAMA JUDICIAL INFORMATION SYSTEM
CASE ACTON SUMMARY
CIRCUIT CRIMINAL

THE CIRCUIT COURT OF MOBILE

CITY OF MOBILE VS MCCOY BYRON C

CASE: CC 2003 003229.00

Charge01: Failure To Obey

* * *

DATE	ACTIONS, JUDGEMENTS, AND NOTES
	* * *
11/21/03	Plea of Not Guilty and Waiver of Arraignment filed by defendant's attorney Michael Wing
	Alias Writ ordered issued 11/18/03 is ordered set aside.
	Status set for 1/16/03 at 11:00 a.m.
03/08/2004	Jury of 14 members were selected, sworn and charged for trial of case 12:00 p.m.
	Jury recessed and instructed to return 03/09/2004 at 9:15.
	IN COURT: City of Mobile Attorney, Paul Carbo Defendants Attorney, Michael Wing
	/s/ R. Stout
03/09/2004	Testimony taken
	Jury recessed and instructed to return 03/10/2004 at 9:00 a.m.
	IN COURT: City of Mobile Attorney, Paul Carbo Defendants Attorney, Michael Wing
	/s/ R. Stout

03/10/2004 After deliberation, by the jury and the court being advised that the jury was hopelessly deadlocked, the Court ordered a mistrial entered.

RESET FOR TRIAL 4-19-2004 AT 8:30 A.M.

CASE ORDERED TRANSFERRED TO JUDGE STOUTS DOCKET.

IN COURT: City of Mobile Attorney, Paul Carbo
Defendants Attorney, Michael Wing

/s/ R. Stout

* * *

APPENDIX E

IN THE SUPREME COURT OF ALABAMA

[SEAL]

April 8, 2005

1040703

Ex parte Byron C. McCoy. PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS (In re: Byron C. McCoy v. City of Mobile) (Mobile Circuit Court: CC03-3230; Criminal Appeals: CR-03-1159).

CERTIFICATE OF JUDGMENT

Writ Denied

The above cause having been duly submitted, IT IS CONSIDERED AND ORDERED that the petition for writ of certiorari is denied.

COST TAXED TO PETITIONER.

HARWOOD, J. – Nabers, C.J., and See, Stuart, and Bolin, JJ., concur.

I Robert G. Esdale, Sr., as Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith set out as same appear(s) of record in said Court.

Witness my hand this 8th day of April, 2005

/s/ Robert G. Esdle, Sr.
Clerk, Supreme Court of Alabama